

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

)  
Tariff Filing Requirements for )  
Interstate Common Carriers )

) CC Docket No. 92-13  
)

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MAR 30 1992

Federal Communications Commission  
Office of the Secretary

COMMENTS

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ENCLOSURE

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## SUMMARY

The Commission has the authority to continue to permit non-dominant carriers, at their election, to not file and maintain tariffs with the Commission. Neither judicial interpretations of the Commission's authority under the Communications Act nor the Maislin case undermine, or otherwise defeat, the Commission's "forbearance rule" which, all interexchange carriers, including the American Telephone and Telegraph Company, have embraced in the decade following its initial adoption in 1982. In addition, Section 4(i) of the Communications Act, under well established judicial precedent, provides broad authority for the Commission to employ regulatory forbearance when market factors justify such an approach as serving the public interest.

Further, and importantly, the Commission's decade-old forbearance rule has been known to, understood by, and effectively ratified in, the U.S. Congress. Such ratification, when considered in light of the fact that the Congress has done absolutely nothing to discourage or dissuade the Commission from continuing to engage in regulatory forbearance, is compelling evidence that the Commission's own interpretation of its authority under the Communications Act is correct. In any event, that interpretation, under the circumstances, is entitled to be given great weight in the review process.

However, if the Commission's forbearance rule is found to be unlawful because it is beyond the Commission's authority to continue to allow, then all common carriers should be required to file tariffs in connection with the telecommunications transmission services they furnish to end-users, albeit only for such offerings extended by them after the determination of unlawfulness. Finally, if non-dominant carriers are required to file and maintain tariffs with the Commission, MCI believes that there will be an adverse effect upon the further development of effective competition in the interexchange marketplace.

For all these reasons, the forbearance rule is within the Commission's authority to continue and should be affirmed in this proceeding as fully serving the public interest.

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COMMENTS

MCI Telecommunications Corporation (MCI), pursuant to the Commission's Notice of Proposed Rulemaking (NPRM) in the afore-captioned matter,<sup>1/</sup> hereby provides its initial comments responsive to questions posed by the Commission in connection with its more than decade-old policy of "forbearance" practiced in connection with its regulation of non-dominant common carriers.<sup>2/</sup>

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<sup>1/</sup> FCC 92-35, rel. January 28, 1992.

<sup>2/</sup> See Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 F.C.C. 2d 308 (1979); First Report and Order, 85 F.C.C. 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445 (1981); Second Report and Order, 91 F.C.C. 2d 59 (1982), recon., 93 F.C.C. 2d 54 (1983); Second Further Notice of Proposed Rulemaking, F.C.C. 82-187, released April 21, 1982; Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983); Third Report and Order, Mimeo No. 012, released October 6, 1983; 48 Fed. Reg. 46,791 (October 15, 1983); Fourth Report and Order, 95 F.C.C. 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, F.C.C. 84-82, released March 22, 1984, 49 Fed. Reg. 11,856 (March 28, 1984); Fifth Report and Order, 98 F.C.C. 2d 1191 (1984); Sixth Report and Order, 99 F.C.C. 2d 1020 (1985), rev'd, MCI Telecommunications Corporation v. Federal Communications Commission, 765 F.2d 1186 (D.C. Cir. 1985), (hereinafter, MCI v. FCC). (Hereinafter, collectively, "Competitive Carriers")

### INTRODUCTION AND SUMMARY

In ITS NPRM, the Commission is undertaking to re-examine whether the "permissive tariffing" allowed carriers classified as "non-dominant" because they lack market power, or the ability to act in an anti-competitive manner, is "lawful." This re-examination results directly from a challenge made by the American Telephone and Telegraph Company (AT&T), the only interexchange carrier classified as "dominant," to the Commission's authority to continue to apply its so-called "forbearance rule."<sup>3/</sup> Even though the Commission has substantially deregulated AT&T, such that its outbound business services, for example, are provided under either "further streamlined regulation" or "individually negotiated contracts,"<sup>4/</sup> AT&T complains because the Commission still

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<sup>3/</sup> AT&T challenged the Commission's regulatory regime by bringing a formal complaint against MCI in 1989, contending that MCI's conformance with the Commission's forbearance rule constitutes a violation of the Communications Act of 1934. AT&T's complaint was rejected by the Commission in a companion order adopted with this NPRM. See AT&T Communications v. MCI, File No. E-89-297, rel. January 28, 1992.

What in fact began as a simple protest by AT&T that its own deregulation had not occurred quickly enough unfortunately has turned into a major assault on an effective, long-standing pro-competitive Commission policy and program largely responsible for the level of competition that exists today in the interexchange telecommunications market.

<sup>4/</sup> See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991) (Interexchange Competition). This proceeding culminated a long list of Commission actions reducing AT&T regulation so significantly that its regulation today doesn't even remotely resemble what it was a mere five years ago. Thus, AT&T is permitted to furnish equipment and enhanced services on essentially a deregulated basis and to do so  
(continued...)

refuses -- and properly so -- to regulate it in the same manner as carriers altogether lacking in market power. Indeed, had the forbearance rule been extended to AT&T, it would not, MCI submits, be challenging the Commission's regulatory regime or the authority required to establish it.<sup>5/</sup>

In this filing, MCI will show that the Commission possesses the authority under the Communications Act of 1934, as amended,

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<sup>4/</sup>(...continued)  
without need for structural separation. In addition, AT&T is, for the most part, no longer rate-of-return regulated, and the "price cap" form of alternative price regulation for AT&T -- still classified as "dominant" -- has provided AT&T with substantial pricing flexibility, since prices no longer need to be based exclusively on costs. And, by manipulating the tariff process, AT&T has been allowed to discount standard services for select users via alternative rate structures ("Tariff 12"), to target standard service discounts at particular customers ("Tariff 15"), and to provide services to "government" at any price deemed by AT&T to be necessary to win a procurement or retain business ("Tariff 16").

<sup>5/</sup> Previously, AT&T has argued in support of mandatory detariffing, claiming that tariffs were unnecessary to prevent anti-competitive price discrimination by non-dominant carriers because such carriers were not capable of engaging in such discrimination "without suffering the discipline of the marketplace." See Sixth Report and Order, 99 FCC2d at 1027.

Indeed, subsequent to the Court's decision in MCI v. FCC, AT&T Information Systems, an affiliate of AT&T, planned to acquire service from AT&T and resell it without benefit of a tariff, a practice AT&T now contends is unlawful. AT&T thus championed non-tariffing until it decided that its continued regulation as a "dominant" carrier was at odds with "understandings and expectations" with regard to the evolution of its own regulation. See Letter from Francine J. Berry, AT&T, to Donna R. Searcy, FCC, dated August 7, 1989. (A copy of this letter, which accompanied AT&T's formal complaint initiating E-89-297 against MCI, is appended hereto and incorporated herein.)

AT&T's inconsistent posturing on the ultimate question posed in this proceeding serves to disclose well the utter hypocrisy of its position.

to continue to permit non-dominant carriers, such as MCI, not to file tariffs, if that practice furthers the public interest in developing a more effectively competitive interstate interexchange market place. Also, MCI will show that, if the Commission's forbearance rule is found unlawful, then all common carriers should be required to file tariffs in connection with the services they furnish end-users, albeit only for service offerings extended after the determination of the unlawfulness of the forbearance rule.

Further, MCI believes that if all carriers are required to file and maintain tariffs, there will be an adverse impact on competition in the interexchange marketplace. Certainly, the interests of price competition would not be furthered if 400-plus competing carriers are required to publish their prices; and the regulatory costs incurred in tariffing undertakings probably would drive some of the smaller carriers from the marketplace and could cause others not to enter to seek to compete. Additionally, under the current statute, it is difficult to comprehend how so-called "streamlined regulation" could be made any more streamlined than it already is. Finally, any "re-regulation" of non-dominant carriers subject to the forbearance rule today would need to result in the reimposition of additional regulation on AT&T because it alone remains "dominant" under the Commission's current regulatory regime and thus is easily distinguishable from non-dominant carriers. It plainly would be

wrong, under the circumstances, to impose the same regulatory structure on non-dominant and dominant carriers alike, given the fact that market power continues to reside in the latter.

I. THE COMMISSION HAS THE AUTHORITY UNDER THE COMMUNICATIONS ACT TO CONTINUE TO PERMIT NON-DOMINANT CARRIERS NOT TO FILE TARIFFS

The Commission's forbearance, or permissive tariffing, rule is sanctioned by its authority under Sections 203(b)(2) and 4(i) of the Communications Act to modify the requirement in Section 203(a) of the Act that carriers shall file tariffs. The underlying policy does not foreclose non-dominant carriers from filing tariffs, and it preserves the Commission's right to require them to file tariffs, as well as its oversight of their operations. The rule requires non-dominant carriers to comply with Sections 201(b) and 202(a) of the Act, specifically, to charge just and not unreasonably discriminatory rates, which can be enforced through the Section 208 complaint process. In short, the Commission's forbearance rule merely modifies the tariff filing requirements of Section 203(a) without altering either the substantive statutory responsibilities applicable to non-dominant carriers or the Commission's regulatory obligations under the Act. Therefore, the rule was entirely within the Commission's authority to adopt and implement and, now, to continue in effect.

Since 1981 Congress has acquiesced in the Commission's interpretation of its authority under Section 203(b)(2) to pursue its forbearance rule, which the Commission first proposed in its

Further Notice of Proposed Rulemaking in Competitive Carriers.

The Commission and numerous parties have continually informed Congress during oversight, appropriation, authorization and legislation hearings that the Commission does not require non-dominant carriers to file tariffs. Despite this knowledge and understanding of Commission policy and practices, Congress has never amended the Communications Act to reverse or modify application of the forbearance rule, nor has it otherwise criticized the statutory premise for the rule, even though it has amended the Act in other respects over the years. The Supreme Court has ruled that such circumstances provide a strong indication that Congress is in agreement with the Commission's interpretation and application of its statutory authority. See, e.g., United States v. Rutherford, 442 U.S. 544 (1979); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Strother v. Burnet, 287 U.S. 341 (1932); McCaughn v. Hershey Chocolate Co., 283 U.S. 488 (1931).

A. The Forbearance Rule Is within the Commission's Authority under Section 203(b)(2) of the Communications Act to Modify the Tariff Filing Requirement of Section 203(a)

Section 203(b)(2) of the Communications Act authorizes the Commission to modify the requirement of Section 203(a) that "[e]very common carrier ... shall ... file with the Commission and print and keep open for public inspection schedules showing all charges ...." 47 U.S.C. §203(a). Section 203(b)(2) thus provides:

The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

47 U.S.C. §203(b)(2) (emphasis added). The term "modify" plainly refers to any provision in Section 203, including Section 203(a). Moreover, as the Commission correctly explained in its Further Notice of Proposed Rulemaking in Competitive Carriers, "[t]he words 'this section' clearly refer to the entire Section 203. When Congress wished to identify subsections it used the word 'subsection' or 'paragraph' (followed by the letter or number) throughout the Act. See, e.g., Sections 204, 213." 84 FCC 2d at 480. The Commission therefore was correct in concluding in Competitive Carriers that Section 203(b)(2) provides it with "ample authority to remove the requirement of tariff filings where appropriate." Id. at 479.

In modifying the tariff filing requirement of Section 203(a), the forbearance rule merely alters the method by which the Commission ensures that non-dominant carriers comply with their obligations under Sections 201(b) and 202(a) of the Act; it does not eliminate those obligations. Rather than relying on tariffs to enforce compliance, the forbearance rule rationally relies upon the constraints of the marketplace, given non-dominant carriers' lack of market power, the complaint process under Section 208 of the Act, and the Commission's general

supervision processes. See Competitive Carriers, Second Report and Order, 91 FCC 2d at 69; Fourth Report and Order, 95 FCC 2d at 556. In addition, the Commission has reserved its authority to reimpose tariff-filing requirements on carriers subject to the forbearance rule, if marketplace abuses occur which require that approach. Competitive Carriers, Second Report and Order, 91 FCC 2d at 70.

1. The Commission's Action in Modifying the Tariff Filing Requirement Did Not Change Carriers' Substantive Obligations Under the Act

The Commission's conclusion that it has the statutory authority to modify Section 203(a) of the Act so as to forbear from requiring non-dominant carriers to file tariffs did not change carriers' substantive obligations under the Act. This is so because those subject to forbearance -- non-dominant carriers -- lack market power and, therefore, cannot rationally engage in the unreasonable price discrimination or unjust rates proscribed by the Act. See, e.g., Competitive Carriers, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d at 334-337. As the Commission concluded, "the extent to which a carrier can 'discriminate' between and among its various customers or classes of customers (and thus the potential for discrimination violative of the Act) is related directly to the degree of market power it possesses." 77 FCC 2d at 337. Lack of market power also

prevents non-dominant carriers from charging "above-competitive or unjust prices." Id.<sup>6/</sup>

In its First Report and Order in Competitive Carriers, the Commission observed that "[m]arket power refers to the control a firm can exercise in setting the price of its output. A firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest. . . . In contrast, a competitive firm, lacking market power, must take the market price as given . . . ." 85 FCC 2d 1, 21 (1980). In deciding to apply streamlined regulation to certain non-dominant carriers, the Commission concluded that "firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act." Id.

In its Further Notice of Proposed Rulemaking in Competitive Carriers, the Commission similarly noted that:

competitive firms . . . cannot profitably engage in activities of the kind Congress sought to prevent in Sections 201-205 and 214. None of this type of regulation is of any public benefit where firms lacking market power are involved, for they have no ability or incentive to charge unlawful rates.

84 FCC 2d at 458. Its conclusions are consistent with current economic theory. It is well established that

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<sup>6/</sup> This conclusion is fully supported by events occurring in the marketplace since adoption of the forbearance rule. Very few complaints have ever been filed against non-dominant carriers alleging violations of the just and reasonable standard under Section 201(b) of the Act.

for a seller to practice price discrimination profitably, three conditions must be satisfied. First, the seller must have some control over price -- some monopoly power. A purely competitive firm cannot discriminate profitably. . . . Second, the would-be discriminator must be able to segregate its customers into groups with different price elasticities of demand, or into discrete classes with varying reservation prices (the highest prices buyers will pay for any specific unit of output). Third, opportunities for arbitrage -- resale by low price customers to high price customers -- must be constrained.<sup>7/</sup>

Non-dominant carriers clearly do not meet any of the conditions necessary to engage in unreasonable price discrimination within the meaning of Section 202(a) of the Act. They are typically price followers of AT&T, the dominant carrier, and lack the ability to raise prices to supra-competitive levels or reduce them to unreasonably low levels; they cannot segment their customers into discrete groups and set different reservation prices for each group but, rather, they must respond to the pricing structures established by AT&T; and they are legally incapable of preventing arbitrage because the Commission precludes the imposition of unreasonable restrictions on resale.<sup>8/</sup>

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<sup>7/</sup> F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* (3rd ed. 1990), at 489. Accord 1 R. Schmalensee & R. Willig, *Handbook of Industrial Organization*, Ch. 10.1 (1989), at 599; D. Carlton & J. Perloff, *Modern Industrial Organization* (1990), at 437.

<sup>8/</sup> *Resale and Shared Use of Common Carrier Services*, 60 FCC 2d 261 (1976), recon., 62 FCC 2d 588 (1977), aff'd sub nom. AT&T v. FCC, 572 F.2d 17 (2d Cir. 1977), cert. denied, 439 U.S. 875 (1978); *Resale and Shared Use of Common Carrier Domestic Switched Network Services*, 83 FCC 2d 167 (1980).

Economic theory, therefore, supports the Commission's judgment in Competitive Carriers that "[a] necessary condition for a seller to practice price discrimination profitably is that it have some market power. See F.M. Scherer, Industrial Market Structure and Economic Performance Chapter II (2d ed. 1980). Non-dominant firms, by definition, do not possess market power." 85 FCC 2d at 31 n.77.

Notwithstanding that non-dominant carriers lack the economic ability to engage in unreasonable price discrimination, much less charge unreasonable or predatory prices, they must nonetheless adhere to the ratemaking strictures of Title II. In Competitive Carriers, the Commission ruled that "forbearance from our tariff filing requirements with respect to non-dominant carriers would not have the effect of abrogating the commands of Sections 201(b) and 202(a) that rates and practices be just and reasonable and not unjustly discriminatory." Second Report and Order, 91 FCC 2d at 69. As a precaution, the Commission also provided:

To remedy any irrational carrier conduct or aberrations that might occur, we proposed to enforce Sections 201(b) and 202(a) through the complaint process set forth in Section 208. In this way, compliance with congressional policies is secured. In the unlikely event that our forbearance has adverse consequences, the Commission can take such remedial action as may be necessary to protect the public, including the reimposition of the tariff filing requirement. Thus, while we intend to rely on competitive market forces in the first instance to secure carrier compliance with the Act, this use of the complaint process allows for the continued monitoring of the

justness and reasonableness of the charges  
and practices of resale carriers.

Id. at 70 (footnotes omitted); see Fourth Report and Order, 95  
FCC 2d at 556.<sup>9/</sup>

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<sup>9/</sup> The Commission's forbearance rule is consistent with the statutory scheme of regulation and, therefore, materially different from the deregulatory policy of the Federal Power Commission that the court invalidated in *FPC v. Texaco*, 417 U.S. 380 (1974). In that case, the FPC in effect exempted small natural gas producers from regulation, allowing them to "sell gas at the price the market would bear, even though in excess of maximum rates set for producers in pertinent area rate proceedings." 417 U.S. at 384. The FPC said it would regulate the small producers indirectly by "regulating the rates of pipelines and large producers to whom the small producers sell their gas." Id. The issue before the Court was whether the agency's deregulation order was "invalid for failure to comply with the [Natural Gas] Act's requirement that the sale price for gas sold in interstate commerce be just and reasonable." Id. at 394.

The court decided that the FPC did not seek to apply the requisite just and reasonable statutory standard to small natural gas producers. It noted that the FPC's order implied that "reasonableness would be judged by the standard of the marketplace," id., but concluded that "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act." Id. at 397 (emphasis added). The court stressed that "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." Id. at 388 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)).

In contrast, the Commission's forbearance rule does not exempt non-dominant carriers from complying with the obligations of Sections 201(b) and 202(a) of the Communications Act, exempt them from the reach of Section 208, or defer to the marketplace the responsibility to serve as the final ratemaking arbiter. Rather, consistent with *FPC v. Texaco*, forbearance regulation simply constitutes a different, less intrusive method of ensuring that the rates of non-dominant carriers comply with the statute.

The U.S. Court of Appeals for the D.C. Circuit has acknowledged that the forbearance rule "maintain[s] the basic substantive requirements that carriers charge 'just and reasonable' rates and not engage in 'unreasonable discrimination.'" *MCI v. FCC*, 765 F.2d, 1188. See also *MCI v.*  
(continued...)

Accordingly, the forbearance rule results from the entirely reasonable exercise of the Commission's authority under Section 203(b)(2) to modify the tariff filing requirement of Section 203(a), is based on sound economic and public interest considerations, and is consistent with the requirements of Sections 201(b) and 202(a) of the Act. Since its enactment ten years ago, the forbearance rule has facilitated the growth of competition in interexchange telecommunications by relieving non-dominant carriers of unnecessary regulatory burdens. The Commission's original justifications for adopting the forbearance rule remain valid today and the rule continues to provide impetus toward realization of an effectively competitive interexchange market. The Commission, therefore, has a both a statutory and a rational basis for reaffirming its forbearance rule. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

B. Judicial Interpretations of Section 203(b)(2) Do Not Undermine the Commission's Forbearance rule

The courts have reviewed the scope of the Commission's authority under Section 203(b)(2) in only a few instances and

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<sup>2/</sup>(...continued)  
FCC, 917 F.2d 30,35 (D.C. Cir. 1990) (currently "only AT&T ... must file its rates as tariffs, although all carriers are subject to the statutory requirement that their rates not be unduly discriminatory.").

none of those decisions undermines the Commission's forbearance rule.

1.    The "Sixth Report and Order", "Special Permission"  
          and "Enlarged Notice" Decisions

In MCI v. FCC, the Court vacated the Commission's proposed "mandatory detariffing" requirement set forth in the Sixth Report and Order in Competitive Carriers as inconsistent with Section 203(b)(2) of the Act. The Sixth Report and Order eliminated, rather than modified, the tariff filing requirement of Section 203(a) by prohibiting non-dominant carriers from filing tariffs.

The Court found that, while Section 203(b)(2) authorizes the Commission to modify Section 203, it does not authorize "wholesale abandonment or elimination of a requirement." 765 F.2d at 1192. Therefore, it held, Section 203(b)(2) did not allow the Sixth Report and Order's complete elimination of the requirement in Section 203(a) that "every common carrier . . . shall, within such reasonable time as the Commission shall designate, file" tariffs. Id. at 1191-92. The Court expressly declined, however, to consider the issue of "permissive tariffing," which is the essence of the forbearance rule under review in this proceeding. Id. at 1196. As shown supra, permissive tariffing, unlike mandatory detariffing under the Sixth Report and Order, does not mean the elimination of tariffing; rather, it means modification of a requirement that all carriers file tariffs, even if it makes no sense whatsoever for them to do so.

The Court concluded that "if the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress," but it noted that, "[i]n so ruling, we do not reach the question whether the FCC's earlier permissive orders are invalid." 765 F.2d at 1195-96 (emphasis added). Those earlier orders, by contrast, permitted non-dominant carriers to continue to file tariffs, if they chose to do so.<sup>10/</sup>

Two earlier Second Circuit cases dealt with the Commission's authority under Section 203(b)(2). One is inapposite and the other supports the Commission's interpretation of its authority. In American Telephone & Telegraph Co. v. FCC, 487 F.2d 865 (2d Cir. 1973) ("Special Permission"), the Court ruled that Section 203(b)(2) did not authorize the Commission to require AT&T to obtain "special permission" prior to filing tariffs to revise its service prices. The court explained that "the statutory scheme of the Communications Act reflects the realization of Congress that when a carrier is prevented from placing in effect new rate increases it may suffer irreparable loss which in turn may impede the provision of adequate service during a period of rising

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<sup>10/</sup> In prosecuting its appeal of the Sixth Report and Order, MCI argued more broadly to defeat mandatory detariffing; it argued that the Commission was without authority to allow any carrier not to file tariffs in connection with their services for end-users. However, MCI plainly did not prevail as to its broader contention because the D.C. Circuit did not mandate that "all carriers must file tariffs." The Court left completely undisturbed the Commission's then three-year-old approach to "permissive tariffing" which, it appears, all interexchange carriers have embraced at one time or another in the conduct or potential conduct of their businesses.

costs." 487 F.2d at 874 (footnotes omitted). Moreover, the court concluded, the Commission's requirement effectively "prescribed" AT&T's existing rates without affording AT&T the hearing required under Section 205 of the Act.

Unlike in Special Permission, the forbearance rule does not restrict or circumscribe a non-dominant carrier's (or any carrier's, for that matter) right to file tariffs for new services or to revise its rates for existing services, and it certainly does not result in any prescription of rates. The rule permits non-dominant carriers to file tariffs at any time for their services, if they choose to do so. It also permits non-dominant carriers to establish new rates and services, or change existing ones, without the necessity of filing tariffs. The rule, therefore, in no respect hampers the ability of non-dominant carriers to provide adequate services and obtain reasonable compensation. Accordingly, the Special Permission decision cannot be construed to suggest that the Commission's forbearance rule is not supported by Section 203(b)(2).

In dicta, Special Permission says that "under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty day notice provision." 487 F.2d at 879. That statement, however, was not intended to be a conclusive delineation of the Commission's authority under Section 203(b), but must be read in the context of the Commission's attempt to add a tariff review requirement that was not provided for in the Act. That was made clear in a

decision by the same court one year later, which explained that the Special Permission analysis of Section 203(b) must be read only as a critique of the Commission's authority to adopt the special permission requirement and was not intended to serve as a general exposition of the scope of the Commission's authority under that provision. See American Telephone & Telegraph Co. v. FCC, 503 F.2d 612, 617 (2d Cir. 1974) ("Enlarged Notice").

In Enlarged Notice, the same court sustained, over AT&T's objections, the Commission's authority under Section 203(b) to "enlarge[] from 30 days to 60 days the required notice period for common carriers filing rate increases." Id. at 613. In addition to limiting the Section 203(b) analysis of the Special Permission decision to the facts of that case, the court in the Enlarged Notice decision took issue with the Special Permission court's analysis of the legislative history of Section 203(b). In Special Permission the court asserted that Section 203(b) was copied from a similar section of the Interstate Commerce Act (ICA) (49 U.S.C. § 6(3)), and that "[i]t is clear from the legislative history that Section 203(b) conferred no greater power in this respect upon the FCC than was granted to the (ICC) . . . ." 487 F.2d at 879. In Enlarged Notice, however, the court declared, "[i]t seems clear that the Congress did not copy Section 203(b) from 49 U.S.C. § 6(3))," since the latter statute explicitly limited the Interstate Commerce Commission's (ICC's) power to modify the notice period in a way which the Communications Act did not. 503 F.2d at 617 (emphasis added).

Moreover, the court in Enlarged Notice observed that "[i]t is significant that where Congress intended that an agency have the power to modify the 30-day notice period only by decreasing the period, it found clear and unambiguous language to express that power." Id. The court cited sections of the enabling statutes of five regulatory agencies with tariff notice provisions analogous to Section 203(b) of the Communications Act, but which explicitly permit those agencies only to reduce the required notice periods. 503 F.2d at 617 n.7. The court concluded that because the authority granted to the Commission by Section 203(b)(2) is not limited to reducing the notice requirement, the Commission had the authority to enlarge the notice requirement.

By the same token, if Congress had intended to restrict the Commission's authority under Section 203(b)(2) to modify only the notice requirement or only the form of tariffs, it would have so provided explicitly. See, e.g., 16 U.S.C. § 824d(d), where the Federal Power Commission was given authority only to change the specified notice period. Instead, Congress drafted Section 203(b)(2) in a manner that gives the Commission broad authority to "modify any requirement made by or under the authority of this section (emphasis added)," including, it appears, the tariff filing requirement of Section 203(a). The Commission's forbearance rule, therefore, relies on an interpretation of Section 203(b)(2) that is entirely consistent with the Enlarged Notice court's interpretation of that provision.

2. Maislin Industries, Inc. U.S. v. Primary Steel, Inc.

In Maislin Industries, Inc. U.S. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990), the Supreme Court ruled that an ICC policy relieving a shipper of the obligation to pay a motor common carrier's tariffed rate for a service, when the parties had privately negotiated a lower rate, violated the ICA. Under the ICA, the Court stated, "[t]he duty to file rates with the Commission . . . and the obligation to charge only those rates . . . have always been considered essential to preventing price discrimination and stabilizing rates." 110 S.Ct. at 2766. However, as Justice Scalia observed in his concurring opinion, "the obligation to charge the filed rate applies only to those carriers required to file the rate . . . ." Id. at 2771 (Scalia, J., concurring) (emphasis in original).

The Court held that this obligation, embodied in the "filed rate doctrine," "forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate." Id. at 2768. It ruled that the doctrine was violated in this case because, "[b]y refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination the Act by its terms seeks to prevent." Id.

The Commission's forbearance rule is not inconsistent with the Maislin decision. It does not permit a non-dominant carrier to negotiate a private rate with a customer that is different than the rate reflected in any tariff it files for the same

service for similarly-situated customers.<sup>11/</sup> The rule allows non-dominant carriers to provide service on a non-tariff basis, but expressly does not relieve them of the responsibility to charge just and not unreasonably discriminatory rates. In short, the forbearance rule does not sanction carrier engagement in practices that violate the Communications Act, as the ICC's offending policy would have permitted with respect to its statute.

Cases under the filed rate doctrine invariably involve situations where the rates or terms of a private contract have impermissibly deviated from the rates or terms in a tariff on file with an agency. See, e.g., Armour Packing Co. v. U.S., 209 U.S. 56 (1908) (rate in private contract held to be invalid when tariff on file specified a higher rate); Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) (passenger who purchased a train ticket at a rate misquoted by the ticket agent liable for the higher tariff rate); American Broadcasting Cos., Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980) (denying effect to a contractual agreement restricting a carrier from increasing its tariffed rates). To the extent that the filed rate doctrine is embodied in the Communications Act, it applies only in the context of

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<sup>11/</sup> Thus, a non-dominant carrier is free to transact by tariff for its standard services and by contract for its non-standard offerings. Unlike under the filed rate doctrine and Maislin, there is no price variation for the same service offering; rather, price variations exist alongside other terms and conditions that distinguish non-standard from standard offerings, such as those pertaining to term and volume commitments and early termination and under-utilization penalties.